ONG KEE CHAK

v.

AU HENG TONG

HIGH COURT MALAYA, PULAU PINANG
JEFFREY TAN JC
[CIVIL APPEAL NO: 12-45-95]
24 OCTOBER 1995

NEGOTIABLE INSTRUMENTS: *Cheque - Dishonoured cheques - Action against drawer and indorsers - Appeal against decision of trial court - Whether respondent was a holder - Whether appellant in fact indorsed the cheques - Whether appellant was a true indorser - Consideration of ss. 27, 28, 29, 30, 38, 55 & 56 of the Bills of Exchange Act 1949.*

The respondent had brought an action, as holder and bearer of three dishonoured cheques, against the drawer and the indorsers of the said three cheques. The learned magistrate ordered the drawer and indorsers to pay the respondent the sum total of the cheques and the appellant being one of the indorsers appealed against the decision.

Held:

[1] The appellant whose signature appeared at the back of the cheques was a party thereto for value and since value had been given the respondent was a holder for value. Bills and notes are an exception to the general rule and consideration is presumed till the contrary is proved. Accordingly the burden of showing that there was a total failure of consideration in respect of the said cheques rested with the appellant. In the present case that burden was not discharged by the appellant.

[2] There was no evidence that the three cheques were obtained by fraud, duress, or force and fear, or any unlawful means or for an illegal consideration. Infusing the provisions of the Bills of Exchange Act 1949 to the admitted and undisputed facts of the case, the most reasonable conclusion was that the cheques payable in cash to bearer were negotiated by delivery from the first defendant to the appellant and the 3rd defendant and from them to the respondent, the eventual bearer of the said cheques.

[3] It was clear that the signatures at the back of the said cheques were the appellant's and the 3rd defendant's engagement that on due presentment it shall be accepted and paid according to its tenor and that if it be dishonoured they will compensate the respondent or a subsequent indorser who is compelled to pay it, namely the respondent who is a holder in due course and for value.

[4] The defence was a mere denial and no reason or no sufficient reason was advanced as would warrant the disturbance of the judgment of the trial Court.

[Appeal dismissed with costs.]

Cases referred to:

Algemene Bank Nederland NV v. Happy Valley Restaurant Pte Ltd [1991] 2 MLJ 289 ***(refd)***

Jebsen & Jebsen (Singapore) Pte Ltd v. Yeung Hoi Kwang [1978] 2 MLJ 96 ***(refd)***

Lee Khoi Foo v. Lim Chai Hock [1994] 2 CLJ 401 ***(refd)***

Miller Associates (Australia) Pty Ltd v. Bennington Pty Ltd and Another [1975] ALR 144 ***(dist)***

Oliver v. Davis and Anor [1902] 2 All ER 353 ***(cit)***

Ranchordas Purshotam v. Ena Mohamed Ismail [1934] MLJ 155 ***(refd)***

Legislation referred to:

Bills of Exchange Act 1949, ss. 2, 8(3), 27(2), 28(2), 29, 30(1), (2), 31(2), 32(a), 38, 55(2)(a), (b), 56

For the appellant - Wong Yee Chue; M/s Mahinder Singh Dulku & Co
For the respondent - Honey Tan; M/s Ean Co

Reported by Satish Nair

JUDGMENT

Jeffery Tan JC:

This is the 2nd defendant's appeal against the judgment of the learned Magistrate ordering him and the other defendants, in a consolidated action by the respondent – as holder and bearer of 3 dishonoured cash cheques totaling RM30,000 – against the drawer (1st defendant) and the indorsers of the said dishonoured cheques (appellant and 3rd defendants), to pay to the respondent/plaintiff the sum of RM30,000 together with interests and costs.

When this appeal was argued, the following findings of fact by the trial Court were not challenged. The respondent was the holder and bearer of the said cheques. The three cheques drawn by the 1st defendant were payable in cash. The appellant and 3rd defendant signed the said cheques – as signatories of the 1st defendant's banking account – and signed their signatures at the back of the said cheques. When the cheques were presented for payment, it was dishonoured with the remark "payment stopped." The appellant, 3rd defendant and respondent were directors of the 1st defendant company. Pursuant to a resolution of the board of directors of the 1st defendant, the plaintiff loaned RM100,000 to the 1st defendant. The 1st defendant repaid part of the loan,

but RM73,000 remained outstanding. The 1st defendant also owed RM9,000, being arrears of wages, to the respondent. In 1989, the respondent was asked to leave the 1st defendant company. A car, PU9, the property of the 1st defendant, was registered in the name of the respondent. At the request of the 3rd defendant, the respondent retransferred the car to the 1st defendant, but not before the 3rd defendant had agreed and indorsed, as did the appellant, the said cheques. Notice was given of the dishonour of the said cheques.

The following findings of facts by the trial Court were also not in issue. The appellant admitted that he indorsed the cheques. The appellant had knowledge of the respondent's loan to the 1st defendant and knew why he indorsed the cheques.

In his written grounds, the learned Magistrate expressed the following observation:

> Defendan Kedua tidak 'impress' Mahkamah sebagai saksi yang bercakap benar, Beliau mengelak dari memberi gambaran yang sebenar.

However, it was submitted in this appeal, by Mr. Wong Yee Chue for the appellant, that the appellant was not liable on the 3 cheques. Citing *Oliver v. Davis and Another* [1902] 2 All ER 353, he contended that those cheques were tendered in settlement of the 1st defendant's debt, but there was no consideration moving from the respondent to the appellant. He submitted, (i) that the appellant could only be liable in the context of ss. 28 and 56 of the Bills of Exchange Act 1949 (the Act), (ii) that whether the respondent was a holder in due course was debatable, and (iii) that, on the facts, the appellant did not indorse the said cheques and the appellant was not a true indorser. On the latter submission, Mr. Wong extended the Australian Supreme Court case of *Miller Associates (Australia) Pty Ltd v. Bennington Pty Ltd. and Another* [1975] ALR 144, where it was held that the 2nd defendant had not signed the cheque as endorser because of the words, "Pay to Raine & Horne Pty Ltd", he wrote above his signature.

Yet, with respect to Mr. Wong, his submission was doctrinaire, as it failed to take into account the facts of the case (admitted and not disputed) and the law applicable. The 3 cheques (P1a to P1c) drawn by the 1st defendant company were signed, by the appellant and 3rd defendant as the signatories of the 1st defendant's banking account. The 1st defendant's direction to the Lee Wah Bank Limited, "pay cash or bearer", was without any words prohibiting transfers or indicating any intention that it should not be transferable or was not negotiable. A payee was not named, but cash was directed to be paid to the bearer (see s. 8(3) of the Act). At the back of all

those 3 cheques were the signatures simpliciter of the appellant and 3rd defendant, without any words directing, as in *Miller Associates (Australia) Pty Ltd v. Bennington Pty Ltd. and Another* [1975] ALR 144, that the cheques were payable to a particular party.

Section 30 of the Act provides the following presumptions of value and good faith:

> 30(1) Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value.
>
> 30(2) Every holder of a bill is *prima facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill.

Therefore, it must be presumed, in the absence [of] any evidence to the contrary, that the appellant and 3rd defendant were parties for value (see *Lee Khoi Foo v. Lim Chai Hock* [1994] 2 CLJ 401) and that the respondent was a holder in due course (see s. 2, which defines a "holder" as the "payee or indorsee of a bill or note who is in possession of it, or the bearer of it", and s. 30(2)).

Section 27(2) provides that "where value has **at any time** (emphasis added) been given for a bill the holder is deemed to be "a holder for value" as regards the acceptor and all parties to the bill who become parties prior to such time." Section 29 defines "a holder in due course" in the following terms:

> 29(1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely:
>
> (a) that he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact;
>
> (b) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him, he had no notice of any defect in the title of the person who negotiated it.

Yet, that distinction between a holder for value (s. 27) and a holder in due course (s. 29), with regard to the liability of the appellant and 3rd defendant, held no significance whatsoever. The appellant and 3rd defendant, by their simple signatures at the back of the said cheques, had indorsed the said cheques (see s. 32(a) of the Act) and engaged that the 3 cheques on due presentation shall be accepted and paid according to its tenor, that is in cash,

and that if it be dishonoured they would compensate the **holder** or a subsequent indorser compelled to pay it (see s. 55(2)(b)). The rights of the respondent – as **holder** (s. 2) and **holder** in due course (s. 30(2)) – and the liability of the appellant and 3rd defendant are also spelt out in the following provisions of the said Act:

> 38. The rights and powers of the holder of a bill are as follows:
>
> (a) he may sue on the bill in his own name;
>
> (b) where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill;
>
> 56. Where a person who signs a bill otherwise than as drawer or acceptor, he thereby incurs the liability of an indorser to a holder in due course.

Mr. Wong expostulated that was no valuable consideration moving from the respondent to the appellant. In particular, he referred to s. 28, which reads:

> 28(1) An accommodation party to a bill is a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person.
>
> (2) An accommodation party is liable on the bill to a holder for value; it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not.

However, the appellant and 3rd defendant were liable not only as commodation parties to a holder for value (s. 28(2)) but also as indorsers to the holder of the said cheques (ss. 55(2)(a) and 56). Undoubtedly, the respondent was the holder of the said cheques (see s. 2), and the respondent as holder of the said cheques was *prima facie* a holder in due course (s. 30(2)). In any event, the onus was on the appellant to show that the respondent was not a holder in due course (see *Jebsen & Jebsen (Singapore) Pte Ltd. v. Yeung Hoi Kwang* [1978] 2 MLJ 96; but it would be seen, that the respondent was also a holder for value.

Section 27 reads as follows:

27(1) Valuable consideration for a bill may be constituted by

(a) any valuable consideration sufficient to support a simple contract;

(b) an antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.

27(2) Where value has at any time been given for a bill the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who become parties prior to such time.

...

The appellant and the 3rd defendant, whose signatures appeared at the back of the cheques were *prima facie* parties thereto for value (s. 30(1)). Since value had been given, the respondent was a holder for value (s. 27(2)). Furthermore, unlike the case of a simple contract where the person who sues on it must plead and prove consideration, bills and notes are an exception and consideration is presumed till the contrary is proved, and, accordingly, the burden of showing, in respect of the said cheques, that there was a total failure of consideration rested with the appellant (see *Algemene Bank Nederland NV v. Happy Valley Restaurant Pte Ltd* [1991] 2 MLJ 289 at 2921). In the instant case, that burden was not only not discharged, but it was admitted that the 1st defendant had issued those cheques in settlement of its antecedent debt – the valuable consideration – and s. 27(2), although available, was not really needed.

There was no evidence that the 3 cheques were obtained by fraud, duress, or force and fear, or any unlawful means or for an illegal consideration. Therefore, infusing the provisions of the Act to the admitted and undisputed facts, the findings of fact only be, most reasonably; that the cheques payable in cash to bearer were negotiated by delivery (see s. 31(2)) from 1st defendant to appellant and 3rd defendant and from appellant and 3rd defendant to the respondent - the eventual bearer of the said cheques, that the signatures of the appellant and 3rd defendant at the back of the said cheques were the appellant and 3rd defendant's engagement that on due presentment it shall be accepted and paid according to its tenor (see *Ranchordas Purshotam v. Ena Mohamed Ismail* [1934] MLJ 155, where a promisory note payable by instalments was indorsed for value after some instalments had fallen due and it was held that the indorsee is entitled to recover against the maker the whole of the balance payable on the note according to its tenor notwithstanding that there had been payment of certain sums under an antecedent agreement between maker and payee for the settlement of the whole amount of the note for a lesser sum), that is in cash, and that if it be dishonoured they will

compensate the respondent or a subsequent indorser who is compelled to pay it, and, that the respondent was a holder in due course and for value.

The defence, and the trial court saw through it, was a mere denial. In the appeal, no reason or reason sufficient was advanced as would warrant the disturbance of the judgment of the trial court.

Accordingly, the appeal is dismissed with costs.